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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL B. MILLER, Defendant and Appellant.	C083878 (Super. Ct. No. 15F01272)

Following a jury trial, defendant Daniel B. Miller was convicted of 17 counts of lewd and lascivious acts upon a child under the age of 14. (Pen. Code, § 288, subd. (a).) The trial court sentenced defendant to a 38-year state prison term.

On appeal, defendant contends (1) expert testimony regarding studies showing that between one to eight percent of child sexual abuse allegations are false deprived him of a fair trial, (2) the prosecutor committed misconduct by arguing in closing that defense counsel's cross-examination of the victim with leading questions was improper, and

(3) trial counsel's failure to preserve the first two contentions through objection constituted ineffective assistance of counsel. We shall affirm.

BACKGROUND

Prosecution Case

A. *Background*

B. was born in April 2002 and lived with defendant and his family when she was a little girl. She moved out of the home at one point but moved back in 2013 or 2014 when she was in the sixth grade. B. liked living with defendant's family because it was more like a family than her very dysfunctional birth family. She called defendant "Uncle" or "Dad," and considered defendant's adult children, who were living in defendant's home when she moved back, as her siblings.

B. *B.'s Testimony*

Defendant began molesting B. in June 2014 by touching her breasts while they were fishing. He started by touching her breasts over her shirt, and then under her shirt and bra. This happened when they were in a vehicle. It felt weird and B. knew it was not right, but she did not know what to do, so she just sat there.

Following this first incident, defendant would touch her breasts every time they went fishing together. They went on fishing trips two to three times a month or every weekend. Other than one or two exceptions, she and defendant were alone on the fishing trips. The fishing trips could have been on Saturday or Sunday because those were defendant's usual days off. Defendant also took B. fishing a couple of times on weekdays, in the evening. She remembered one time they were fishing at 6:00 p.m. when it was dark.

Beginning Christmas 2014, defendant started touching B.'s breasts when they were in the garage. This first happened when she was getting ice from the garage freezer; defendant came behind her and put one hand on her bottom and the other on her breasts, on top of her clothing. While B. felt this was wrong, she would just want to shut down.

Defendant's behavior on the fishing trips worsened over time. At some point, he started touching her vaginal area under her clothing during the fishing trips. She could not remember exactly when this started, but thought it first happened in the back of the family's truck. Defendant touched her legs, pulled down her shorts, and pulled her underpants down below her knees. He eventually started to touch her vagina and digitally penetrate her. B. was in pain, scared, and disgusted when this happened. Since defendant wanted her to have an orgasm, she faked one to get defendant to stop. After it ended, she put on her clothes and defendant drove them home.

B. recalled another incident while they were fishing when defendant came from behind, groped her breasts, and carried her into the back of the vehicle. He then took off her pants and underwear and touched her vagina, which made B. disgusted, mad, and sad.

Another incident happened not long before she was removed from defendant's household in February 2015, when defendant's wife was recovering at home from surgery. While his wife was upstairs asleep, defendant told B., who was sitting on the couch watching television, to go to the garage. Defendant was smoking a cigarette in the garage; he and B. talked and sat on the couch. Next, defendant touched her breasts both over and under her clothes. Defendant pulled down her pants and underwear, leaving B.'s underwear around one of her ankles. He then digitally penetrated and orally copulated B., which left her disgusted, angry, and sad. When B. told defendant she was finished, defendant disagreed and continued to orally copulate her until he got a phone call from his daughter.

Defendant also forced B. to masturbate him in an incident two weeks before his wife's surgery. The incident took place in an area she thought was called "Hogs Back," a state recreation area near one of the locations B. would go fishing with defendant. When B. told defendant she wanted to have her hair colored with streaks, defendant replied that she was going to have to talk him into doing it by giving defendant a "hand job." B. refused to do this. As she went to get in the passenger side of the vehicle from the

driver's side, defendant grabbed B.'s hand and put it on his exposed penis. B. was in the driver's seat, while defendant stood outside the driver's side door. Defendant moved B.'s hand on his penis, causing it to become erect. Defendant maintained a strong grip on B's hand, which prevented her from removing it from his penis. The incident ended with defendant ejaculating outside of the vehicle. It was also their last fishing trip.

Defendant would also molest B. at times before the fishing trips by touching her breasts and bottom as he woke her up. On two separate instances, he touched her vagina over her clothes while B. was in bed. B. tried to push defendant off of her in some of the bedroom instances, while just lying there other times.

Defendant digitally penetrated B. multiple times from June through July 2014 and February 2015. He also orally copulated her multiple times. The first time he escalated beyond touching her breasts was November 1, 2014, and he touched her breasts at least once each month from July through October 2014. Defendant touched her breasts at least twice in November 2014. Defendant orally copulated and digitally penetrated her regularly from November 2014 through February 2015.

Defendant asked B. to perform oral sex on him three or four times, which she refused. Once or twice he asked her to perform intercourse with him as he molested her. Defendant told B. he pictured her when he had sex with his wife. He told B. she could not tell anyone else about him molesting her because that would be wrong.

Defendant told B. she would have to move back with her mother, who did drugs and alcohol, if she told anyone about being molested. She did not tell anyone in defendant's family about what happened because she did not want to break up the family. Other than being molested by defendant, she liked living with his family.

In February 2015, B. told her friend E. that defendant was molesting her. She begged E. not to tell anyone, but E. told another person. After this, B. was summoned to the counselor's office at her school, where she talked to the police.

C. *B.'s Pretrial Statements*

Galt Police Officer Rachelle Barton interviewed B. at school on February 13, 2015. B. told Officer Barton the molesting began in June with defendant touching her rear and progressed to feeling her with her clothes on. Defendant also digitally penetrated and orally copulated her. She would say she had an orgasm to get it over. Two weeks ago, she masturbated defendant to ejaculation after he unzipped his pants. He had asked for sex almost every weekend for the last month, but she said no. She never performed oral sex on defendant.

B. spoke to Galt Police Officer Richard Small after her interview with Officer Barton. She told Officer Small that the last incident with defendant happened on the prior Monday in the garage, where defendant orally copulated her. Defendant also ejaculated on a prior occasion, which happened when she was in the driver's seat and defendant stood outside the front door of defendant's car.

B. conducted a SAFE interview on February 24, 2015. During the interview, she related that, starting in June 2014, defendant touched her in places she did not wish to be touched. Defendant touched her multiple times in the garage and on weekly fishing trips; he touched her breasts over her clothes, orally copulated and digitally penetrated her, and once ejaculated with his penis in her hand. He asked for sex, but she declined.

D. *Defendant's Admissions*

In a recorded February 13, 2015, pretext call, B. told defendant that she did not think she should come home because she did not feel safe there anymore. B. had been talking at school about sexual things and B. felt that what she and defendant were doing was really wrong. Defendant replied, "Okay, then it'll never be again." Defendant said he had been thinking his conduct should end anyway and B. should just come home. When B. said, "I just don't think I want to do anything sexual anymore," defendant replied, "Not a problem. It'll never be again. Never get brought up again." When B. asked defendant if he was sorry for what he did to her, defendant replied, "I am."

A few minutes after the pretext call, defendant left B. a voicemail message asking what was going on and telling her to give him a call. In a second voicemail, defendant said he thought B. was playing when she spoke to him a few minutes ago. He also asked what B. was doing and said he thought she was happy in his family's home.

Defendant was interviewed at the Galt Police Department on February 13, 2015. He and B. would go fishing at 5:00 a.m. He fished on weekends and at times on the way home from work. He had taken B. fishing after work at 4:30 or 5:00 p.m. Defendant did not know why B. made the allegations against him. B. had rubbed up against him a few times when he kissed her goodnight, causing him to feel a little something. He never told his wife about this. Defendant admitted fondling B.'s breasts through her shirt during a fishing trip. He may have rubbed through her pants when she rubbed him, but that was it. He never performed oral sex on her or asked B. to masturbate him.

In a phone interview with the police on February 26, 2015, defendant said he apologized to B.'s mother for B. kissing his neck and sitting on his lap. He said the incident started like a slow lap dance, with B. putting her hand on his penis and defendant touching her breasts. He then came to his senses and said they could not do this. Defendant said he touched B. outside her clothing more than once or twice, but less than 15 to 20 times.

E. *Expert Testimony*

Dr. Anthony Urquiza testified as an expert in the area of child sexual abuse and the effect of child sexual abuse on children.

Most children significantly delay disclosing abuse out of fear of getting in trouble, getting the perpetrator in trouble, or due to threats or intimidation. The victim feels ashamed, humiliated, and embarrassed, which motivates the child to keep silent about being abused.

A child's first disclosure of sexual abuse may be vague and nondescript. If a supportive response is given to this initial disclosure, then the child will be able to talk

more about being abused. For this reason, information about the abuse may increase following the first disclosure.

Disclosing different details to more than one person does not necessarily mean that the allegations are false. Repeated abuse can make it difficult for the child to accurately recall the times and dates of the abuse.

Studies of false allegations of child abuse show that between one and eight percent of the allegations are false. These studies do not discuss the possibility of exaggeration by an alleged child sexual abuse victim.

The Defense

J.M. was defendant's wife; they had two adult children. Defendant was a mason who worked for a general contractor. From June 2014 through February 2015, he would work Mondays to Fridays, getting up at 4:00 a.m. and returning home from 6:30 to 7:00 p.m., or even later. He also worked on many Saturdays and some Sundays. During this time, he would have at most one or two days off each week.

J.M. babysat B.'s mother. B. and her mother lived with the Millers from B.'s birth until she turned three. They started to adopt B., but she returned to live with her mother. B. moved back to the Millers on May 31, 2013. She did not stay at their house some weekends between June 2014 and February 2015.

B. frequently lied to J.M. In one incident, she denied having an E-cigarette at school, but the school principal found it in her backpack. B. also lied about using the phone after J.M. had forbidden her from using it. She had, at times, texted J.M. that she was home when she was not there. B. would lie about being on the computer or watching television when she was supposed to be doing her homework.

J.M. had surgery on February 9, 2015, returning home late in the morning that day. Defendant and B. made her breakfast when she returned home. Defendant left later that day to go fishing, but B. stayed home with J.M. She did not remember napping that day.

Several witnesses testified to never seeing or hearing of defendant acting in a sexually inappropriate manner.

DISCUSSION

I

Defendant contends Dr. Urquiza's testimony about studies on the percentage of false reports of child sexual abuse violated his due process right to a fair trial. The contention is forfeited and without merit.

A.

Defendant's claim concerns a portion of Dr. Urquiza's direct testimony, which we provide as follows:

"Q. Okay. Moving on to the topic of false allegations. Are there any current studies out there regarding the issue of false allegations in child sexual abuse cases?

"A. There's about a dozen research studies related to false allegations of sexual abuse, maybe as many as 15.

"Q. What are the statistics on those research studies regarding false allegations?

"A. The caveat whenever anybody asks me about false allegations that I always give is it's a tough area to do research on. Kids are difficult to do research with. Sexual abuse is tough to do research with. And sexual abuse with false allegations is also very difficult. So, I just want to say that. But the range is as low as about 1 percent of cases that come before law enforcement or CPS are determined to have been false allegations. As high as 6 or 7 or maybe 8 percent in some studies are determined to be false allegations.

"So probably the best study, it's a Canadian study in which they found about 4 percent of cases were determined to be false allegations where, again, it came before law enforcement or CPS and it was determined to be a false allegation.

"What's interesting about that study, is in none of those 4 percent of cases was it the child who made the allegation that was determined to be false. It was somebody else involved in the family or the case.

"Q. Somebody else involved being who? What types of situations?

"A. The best knowledge we have at the moment would be in situations where there's some type of custodial dispute, so a husband and wife separate, get divorced and there's some issue of custody because of the child. In that kind of situation is one of the– I hesitate a little bit because we're talking about really small numbers at 4 percent, but the largest subgroups of cases in which a false allegation is made.

"Q. Would be in a custodial dispute?

"A. Right.

"Q. And this would be one parent accusing another parent of sexual abuse?

"A. Yes. As an effort to try to acquire custody of the child."

Defendant did not object to this line of questioning.

Following this exchange, Dr. Urquiza testified that he did not know the name or names of any victims in this case, had not talked to or interviewed anyone in the case, did not review reports, and did not know the details of the case.

On cross-examination, Dr. Urquiza admitted that the studies did not address incidents of exaggerated claims of sexual abuse. Asked if the Canadian study used the word "appear" or whether the falsity of the claims was actually demonstrated, he replied that this was a "tricky" issue as there was no physical data. Dr. Urquiza continued, "That's one of the problems with sexual abuse. And so that's what the study reported based upon the results. So there is no definitive proof that those were false allegations." Asked if there was accordingly no definitive proof that this established the limit of false reports, Dr. Urquiza answered that it could be closer to one or two percent or it could be closer to seven percent in the 12 to 15 studies. The data from the studies was in a range with the Canadian study being a good study that was roughly in the middle.

Cross-examination on the false report studies concluded with Dr. Urquiza admitting no study addressed victims who made exaggerated claims. Later in cross-examination, defense counsel also got Dr. Urquiza to admit there is no specific set of mental health symptoms to allow one to conclude a person is or is not abused. Determining whether someone was abused was "a criminal issue, not a mental health issue."

The prosecutor's closing argument mentioned the child sexual abuse accommodation syndrome (CSAAS) testimony but did not address the expert testimony on false reports. Defense counsel brought up the false allegation studies in the closing argument, noting that most of the false allegation identified in the studies involved initial reports from third parties, which was also the case here. Counsel argued that four percent of the 700 identified in the Canadian study is 28, and while it is a small amount, it is not so if you are one of the 28, and that "we might have all heard that it's better to let a hundred guilty men go free than one innocent man be convicted." The prosecutor's rebuttal addressed this argument from defense counsel, asserting there was no motive for B. to lie and that false allegations from third-party reports in the studies referenced by Dr. Urquiza typically came in "heated divorce situations. . . . It's not an instance where, in this case, yes, a third party reported it, but we have the child confirming, yes, this is indeed what has happened." The prosecutor also noted that false allegations referenced in these reports came from the parent, not the child.

B.

Defendant's failure to object to the testimony forfeits his contention on appeal. (See *People v. Stevens* (2015) 62 Cal.4th 325, 333 ["the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was improperly admitted"].) We instead address his claim that counsel was ineffective for failing to raise an objection.

A claim of ineffective assistance requires defendant to show substandard performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692 [80 L.Ed.2d 674, 693-696] (*Strickland*).) To establish prejudice, "the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Allowing an expert to testify regarding the statistical probability of false accusation sexual abuse cases has been, with rare exceptions, rejected by the courts. (See, e.g., *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737-738; *State v. Lindsey* (1986) 149 Ariz. 472 [720 P.2d 73, 77]; *State v. Myers* (Iowa 1986) 382 N.W.2d 91, 92, 97-98; *State v. Parkinson* (Ct.App. 1996) 128 Idaho 29 [909 P.2d 647, 654]; *State v. Williams* (Mo.Ct.App. 1993) 858 S.W.2d 796, 801; *State v. MacRae* (1996) 141 N.H. 106 [677 A.2d 698, 702]; *State v. W.B.* (2011) 205 N.J. 588 [17 A.3d 187, 201-202]; *Wilson v. State* (Tex.Ct.App. 2002) 90 S.W.3d 391, 393; *State v. Catsam* (1987) 148 Vt. 366 [534 A.2d 184, 186-188]; *United States v. Brooks* (C.A.A.F. 2007) 64 M.J. 325, 329-330; but see *Alvarez-Madrigal v. State* (Ind.Ct.App. 2017) 71 N.E.3d 887, 892-893 [finding expert testimony that some statistics show less than two or three children out of a thousand made up claims was not improper vouching].) California courts come to the same conclusion as the overwhelming weight of authority hold that such testimony is improper. (*People v. Julian* (2019) 34 Cal.App.5th 878, 880, 887 (*Julian*); *People v. Wilson* (2019) 33 Cal.App.5th 559, 571 (*Wilson*).)[1]

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[1] While our analysis relies primarily on two cases decided after briefing was concluded, *Julian* and *Wilson*, counsel had ample opportunity to seek supplemental briefing on these cases before our opinion was filed. In any event, we find additional briefing is not needed to address this contention.

We agree with *Wilson, Julian*, and the overwhelming majority of other jurisdictions holding such evidence inadmissible. "The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.) Testifying that child sexual abuse victims make false accusations in only one to eight percent of cases informs the jury that the victim here had a 92 to 99 percent chance of telling the truth. Dr. Urquiza's testimony on false reports usurped the jury's credibility finding function was an abuse of discretion.

In *Julian*, Dr. Urquiza testified, "false allegations of sexual abuse by children 'don't happen very often.' 'The range of false allegations that are known to law enforcement or [Child Protective Services] . . . *is about as low as one percent of cases* to a high of maybe 6, 7, 8 percent of cases that appear to be false allegations.' " (*Julian, supra*, 34 Cal.App.5th at p. 885.) The Court of Appeal agreed with the defendant's contention that this testimony "was highly prejudicial, and deprived him of his right to a fair trial." (*Ibid.*) Defendant did not object to the evidence at trial, but the *Julian* court found counsel's ineffectiveness in failing to object deprived him of a fair trial under the *Strickland* standard of prejudice. (*Julian*, at p. 889.) The *Julian* court also found the defendant was prejudiced by trial counsel's soliciting from an investigating officer that the officer believed one of the children was truthful in making claims of sexual abuse against the defendant. (*Ibid.*) Finding these errors prejudicial under any standard of harmless error, the Court of Appeal reversed. (*Id.* at p. 890.)

Dr. Urquiza in *Wilson* "testified that there was a limited amount of research on the topic of false allegations of child sexual abuse, but that false allegations occur 'very infrequently or rarely,' most often during a child custody dispute. He continued, 'There

are a number of studies that talk about the pressures put on children to make a false allegation.' He referred to a 'classic' Canadian study that found 'about 4% of cases in which there was an allegation that was determined to be false,' remarking that '[w]hat was notable [about the study] was that in none of those cases was it a child who made the allegation that was false, it was somebody else,' such as a parent disputing custody." (*Wilson, supra*, 33 Cal.App.5th at p. 568.) The expert admitted on cross-examination that it was difficult to determine whether an allegation is false, but the Canadian study was among the best available. (*Ibid.*) The expert also noted that the 12 to 15 other studies on the subject showed a range of one to six percent false allegations. (*Ibid.*)

The Court of Appeal found the testimony improperly admitted, but not prejudicial under the *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) standard. (*Wilson, supra*, 33 Cal.App.5th at pp. 571-572.) In finding the error harmless, the *Wilson* court cited the relative brevity of the improper expert testimony, the fact that the expert acknowledged it was difficult to determine whether an allegation was false, and the expert's admission he had come across two cases where he believed the child he treated was making false claims of sexual abuse. (*Id.* at p. 572.) The Court of Appeal further relied on expert evidence submitted by the defense to rebut the improper expert testimony. (*Ibid.*) The defense expert "testified that the 4 percent number reflected only the cases in which there was positive proof a child's allegations were false, and that there was no way to know the actual ratio of true to false allegations." (*Ibid.*) The expert also noted there were many specific examples of false memories where children were influenced by adults investigating the alleged crimes or through interviewers using unreliable methods, and that false accusations are most likely to result from outside influences. (*Ibid.*) Finally, the prosecutor did not mention the statistical evidence in closing argument. (*Ibid.*) Thus, where the two victims "testified extensively and the jurors could assess their credibility, other percipient witnesses were called, and the defense offered effective rebuttal expert

testimony, we see no reasonable probability defendant would have achieved a more favorable result in the absence of the challenged testimony." (*Ibid.*)

We find this case is much more like *Wilson* than *Julian*. While improper, Dr. Urquiza's testimony on false allegations was brief both in comparison to his CSAAS testimony and the rest of the prosecution's case. Defense counsel addressed the testimony on cross, but in a manner to reduce its benefit to the prosecution by casting doubt on the ability of a study to actually determine if a claim of sexual abuse was false. This stands in contrast to the cross-examination in *Julian*, where "counsel's questions about multiple studies only opened the door to a mountain of prejudicial statistical data that fortified the prosecutor's claim about a statistical certainty that defendants are guilty. [Citation.]" (*Julian, supra*, 34 Cal.App.5th at p. 889.)

The impact of false accusation testimony differs from *Julian* in another critical way. In *Julian*, the prosecutor's closing argument asked the jury to rely on Dr. Urquiza's statistical evidence to infer guilt. (*Julian, supra*, 34 Cal.App.5th at p. 889.) Defense counsel in *Julian* discussed Dr. Urquiza's testimony in closing, but counsel's discussion of "the statistical percentage of false allegations in a study" was cut short by the prosecutor's objection. (*Ibid.*) After a 15-minute recess, the trial court instructed the jury there was a disagreement between the lawyers about a study and it "should decide the issue based on the evidence introduced about the study, not what the lawyers remember about it." (*Ibid*.) This added to the prejudicial impact by directing the jury's attention to the statistical studies right before deliberation. (*Ibid*.)

In contrast, the prosecutor here did not refer to the improper statistical testimony in closing. While defense counsel did try to minimize the evidence in closing, it did not lead to the prejudicial instruction in *Julian*. Instead, the prosecution sought to refute the defense argument by pointing out that B. had no motive to lie and this case was a different sort from the false allegations in the studies referenced by Dr. Urquiza.

The most important difference between this case and *Julian* is the strength of the case against defendant. Unlike *Julian* (and *Wilson*), defendant here made highly inculpatory statements in the pretext call with B., in his feeble attempt to minimize those statements in the subsequent voicemail, and in his statements to the police. Although defendant did not admit to the details of the sexual assaults as given through B.'s testimony, he made several independent admissions of sexual contact with B., providing crucial corroboration to her testimony and pretrial statements. Unlike *Julian*, this was not a credibility battle between the defendant and victim with the improper expert evidence prejudicially tilting the matter in the prosecution's favor. While this case lacks the uncharged misconduct and competing expert evidence found in *Wilson*, defendant's admissions make the prosecution's case equal to or stronger than the one in *Wilson*.

While *Wilson* applied the *Watson* standard of harmless error rather than *Strickland's* prejudice test, the two standards are very similar. (See *Richardson v. Superior Court* (2008) 43 Cal. 4th 1040, 1050 [finding the term "reasonable probability" in § 1405, subd. (f)(5) regarding motion for DNA testing has the same meaning as it does under *Strickland* and *Watson*].) In light of the strength of the prosecution's case and the manner in which the improper testimony was used here, we find defendant was not prejudiced as defined in *Strickland*. Accordingly, his claim of ineffective assistance fails.

II

Defendant contends closing argument of the prosecutor related to the defense's use of leading questions in cross-examining B. was prejudicial misconduct.

A.

Dr. Urquiza testified on direct examination that in the context of child sexual abuse cases, "suggestibility" referred to asking a child a question about sexual abuse that suggested an answer. He further testified that interviewers are trained not to ask questions in this manner in child sex abuse cases. On cross-examination, Dr. Urquiza

stated that interviewers are trained to get information from the child while minimizing information from the interviewer.

The prosecutor made the following statement during the closing argument:

"On the open-ended questions part of that, Dr. Urquiza, again, explained the best way to talk to a child victim of sexual assault, and it is these nonleading open-ended questions that we want to speak to them with and ask them about as to not get any directed answers.

"[Defense counsel] spent some time with Dr. Urquiza during his cross-examination focusing on the question style that we should be using when speaking to victims of child molest. And again, Dr. Urquiza confirmed and reiterated with [defense counsel] that, yes, leading questions are generally not the way to go, that we want to focus on more open-ended questions.

"Now, if you sit back and remember the testimony when [defense counsel] was talking to [B.] and asking her questions about everything that had been going on, the types of questions that were being asked most, if not all of those questions, were leading questions. That is the only time [B.] ever got confused about any particular dates or when certain things happened is when she was being presented with these very directed leading questions. The way we know we are not supposed to talk to child victims of sexual abuse."

Defendant did not object to this argument.

B.

" ' "To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." ' " (*People v. Charles* (2015) 61 Cal.4th 308, 327, quoting *People v. Linton* (2013) 56 Cal.4th 1146, 1205.) "In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' " (*People v. Hill* (1998) 17 Cal.4th

800, 820, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) The failure to object to the argument forfeits defendant's claim of misconduct. Since defendant contends the lack of objection constitutes ineffective assistance of counsel, we address the merits of his claim.

"Regarding the scope of permissible prosecutorial argument, ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his [or her] case and is not limited to 'Chesterfieldian politeness' " [citation], and he [or she] may "use appropriate epithets . . . ." ' " ' [Citations.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citation.]' Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

Defendant argues the prosecutor's argument misstated the law in attempt to absolve the prosecution of its burden of proving each element beyond a reasonable doubt. In support of his contention, defendant cites his Sixth Amendment right to confrontation, which includes the opportunity to attack a witness's credibility through cross-examination. (See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 59-61 [94 L.Ed.2d 40,

58-60].) He concludes that the prosecutor's comments impermissibly infringed on this right.

The prosecutor's argument did not state that the use of leading questions on cross-examination of B. was contrary to the law. The argument merely noted Dr. Urquiza's testimony regarding the susceptibility of children to leading questions in the context of investigating claims of child sexual abuse and used that to make the inference that B.'s difficulties on cross-examination were a product of being susceptible to leading questions rather than any inherent problem with her credibility. The prosecutor did not argue that defendant is guilty because he cross-examined the complaining witness or used leading questions to do so. (Cf. *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] [improper commentary on the defendant's post-*Miranda*[2] silence]; *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520 ["*Doyle v. Ohio* is founded on the notion that it is fundamentally unfair to use a defendant's post-*Miranda* silence to impeach his trial testimony in view of the implicit assurance contained in the *Miranda* warnings that exercise of the right of silence will not be penalized"].) This was no more than commentary on the state of the evidence, and well within a prosecutor's considerable discretion to argue the case in closing.

Since the argument was proper, defendant's claim that counsel was ineffective for failing to object to it fails. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance"].)

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2 *Miranda v. Arizona* (1996) 384 U.S. 436 [16 L.Ed.2d 694].

DISPOSITION

The judgment is affirmed.

/s/
BLEASE, Acting P. J.

We concur:

/s/
HOCH, J.

/s/
RENNER, J.